IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 372.

WILLIAM G. WALL,

Petitioner,

vs.

STATE BOARD OF BAR EXAMINERS OF THE STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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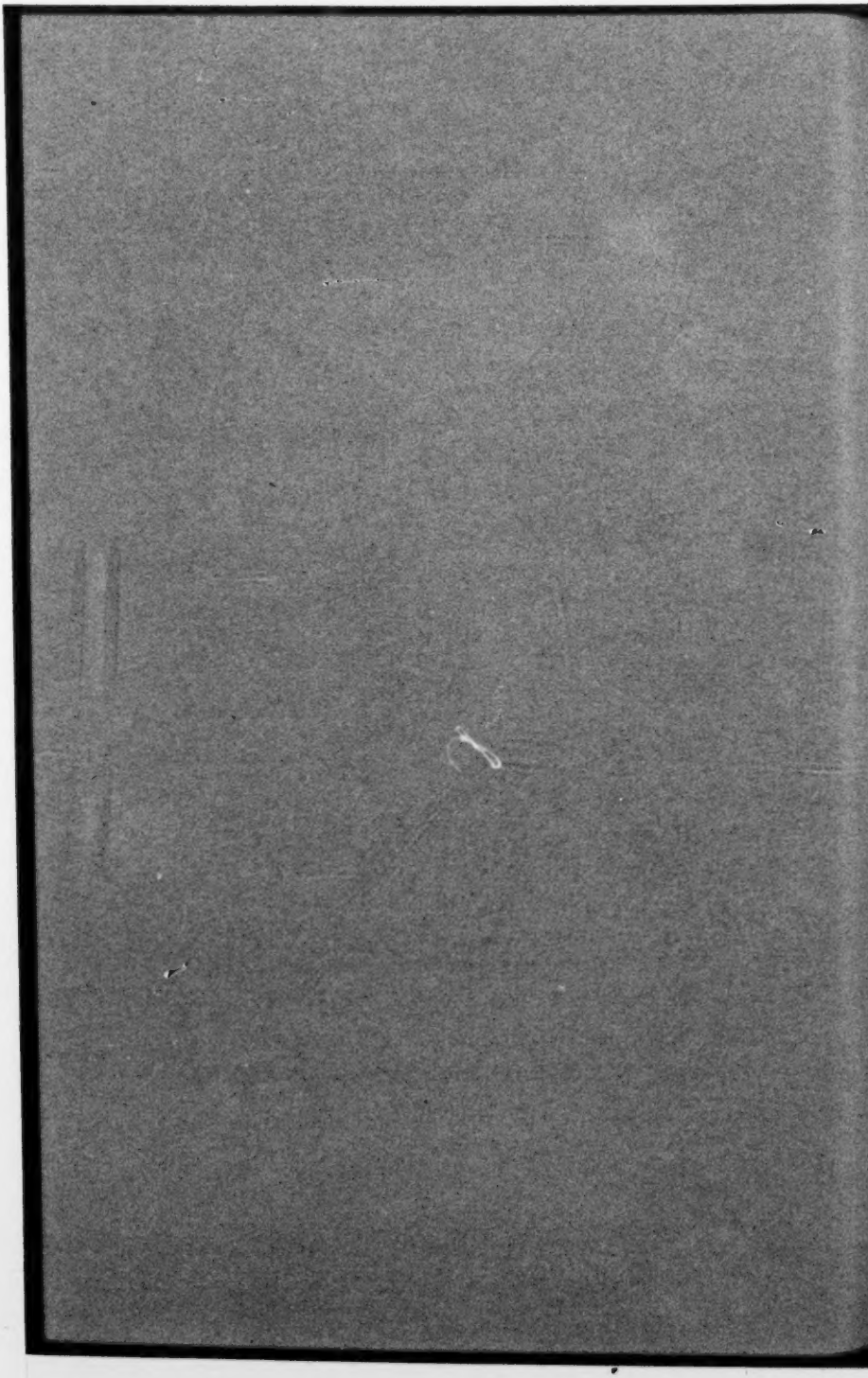

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Statement.

The Statement of respondent is substantially correct except it is to be noted that Rule 9(a) was in effect Rule 6(c) in December, 1924 (Petitioner's Brief, p. 53). It is also to be borne in mind that most of Petitioner's assertions have not been referred to, much less answered. Nor is there any reference to Petitioner's rating on his examination paper; nor is it denied that Petitioner had an "excellent paper" on his said examination. Many cases cited by Respondent are of help to the Petitioner.

As will be hereinafter shown, Respondent in its brief has entirely missed one of the most important points presented by the Petitioner.

In Reply to Argument I of Respondent.

It suffices to say that the admission of attorneys in New Jersey is not a distinctive attribute of the Supreme Court, which merely recommends an applicant for admission after examination. If this "distinctive attribute * * * has never been judicially or legislatively emasculated" then some high Appellate Court should act on it, especially when its exercise by the Court, either by virtue of "excess jurisdiction" or "usurpation of power", has resulted in a violation of an organic law. *St. Louis & S. F. R. Co.* v. *Quinette*, 251 F. 773, 775; *Clayton* v. *Tibbens*, 298 F. 18, 22; *Wagner* v. *Edgington Coal Co.*, 100 W. Va. 117, 120, 130 S. E. 94, 96.

Cases in which this Court has reviewed rules of the State Courts, and also the practice followed by certain associate Justices of State Appellate Courts are: *Pullman Palace Car Co.* v. *Speck*, 113 U. S. 84; *Bartemeyer* v. *Iowa*, 14 Wall. 26.

In Reply to Argument II of Respondent.

Petitioner cited *In re Hahn* and *In re Cosey* merely for proposition that the New Jersey Court of Errors and Appeals has entertained appeals in matters regarding attorneys (Petitioner's Brief, p. 35).

If the New Jersey Court of Errors and Appeals did not take jurisdiction over the State Supreme Court in the *Hahn* and *Cosey* cases, then why did it decide the questions that a Court of Chancery order of disbarment wrongfully affected the therein petitioner's standing as a counsellor at law, and, by the same token, his standing as an attorney at law? Having decided the Chancery phase of the case, why did not the Court of Errors and Appeals

refer the other phase of the matter to the Supreme Court, if the latter court has exclusive jurisdiction in all cases involving counsellors and attorneys, as is the claim made by the respondent?

The *Missouri K. & T. Ry. Co.* v. *McCann* and the other cases cited (Respondent's Brief, pp. 5-6) are not in point for the following reasons:

(a) There is no State Statute or Act of the Legislature involved in the instant case.

(b) The New Jersey Court of Errors and Appeals refused to take jurisdiction so that there is no construction by the Court of last resort.

(c) Simply a court rule is involved.

Contrarywise, this Court has at least intimated that it would take jurisdiction in a situation analogous to that of this Petitioner. *Selling* v. *Radford*, 243 U. S. 46.

At the outset Petitioner has acquired the right to practice law in the State of New York and before this Supreme Court. It is a property right (*In re O'Brien's Petition*, 63 Atl. 777, 63 A. L. R. 777, 780). The facts in the instant case are in no wise similar to those in *Keeley* v. *Evans*, 271 F. 521. A cursory reading of the latter case will prove this. The Respondent Board has made no allegation of objection to Petitioner "because of lack of professional character, conduct unbecoming, not that I am by nature 'turbulent or intemperate', as the facts showed in the *Keeley* case in which the appeal to the United States Supreme Court was dismissed 'on motion of counsel for appellant'" 257 U. S. 667. Now, therefore, since I have already practiced "*pro hac vice*" in New Jersey, is not the arbitrary refusal of the New Jersey tribunals to recommend me for a license in that State to be regarded

as tantamount to a constructive disbarment? We should deal with the substance rather than the form. In substance it has the same effect. Jurisdiction of the high Appellate Courts, including that of this Court to review instances of illegal disbarment or interference with the practice of law is well sustained. 10 Ann. Cas. 539, 544.

In New Jersey I was not permitted to be heard by or appear before Respondent regarding my rating, which has yet to be given me. My examination papers and present professional status show, as prescribed in *Ex parte Robinson*, 19 Wall. 505, "satisfactory evidence that I possess fair private character and sufficient legal learning to conduct causes in Courts for suitors." I have fulfilled all New Jersey requirements.

In *Selling* v. *Radford*, 243 U. S. 46, this Court held in a situation where a member of its Bar was disbarred by the Michigan Supreme Court, at page 50.

(a) That the United States Supreme Court has no authority to re-examine or reverse as a reviewing Court the action of the Supreme Court of Michigan in disbarring a member of the Bar of the Courts of that State for personal and professional misconduct.

(b) That the order of disbarment of the highest court in the State of Michigan was "not binding upon it as the thing adjudged in a technical sense."

(c) That the necessary effect of the Michigan Supreme Court order, as long as it stood unreversed, unless for some reason it is found that it ought not to be accepted or given effect to, has been to absolutely destroy the condition of fair, private and professional character, incompatible with the right to

continue as a member of the Bar of the United States Supreme Court.

The Court further held that on the "case presented" it was not its duty to review the action of the State Court of last resort—not wholly to abdicate its own functions by treating the Michigan judgment as the thing adjudged excluding all inquiry on the part of this Supreme Court, and yet not, in considering the right of one to be a member of the Bar of this Court, to shut its eyes to the status, as it were, of the unworthiness to be such a member, which the judgment must be treated as having established, unless for some reason it deems that consequence should not now be accepted. In other words this Court recognized the absence of fair private and professional character in the petitioner by virtue of the Michigan judgment alone but also recognized its duty to pass on the matter for itself.

This Court further stated at page 51, that it should recognize the condition created by the judgment of the State Court, unless from an intrinsic consideration of the State record, one or all of the following conditions should appear:

(1) That the State procedure from want of notice or opportunity to be heard was wanting in due process.

(2) That there was such an infirmity of proof as to facts found to have established the want of fair private professional character, as to give rise to a clear conviction on its part that it could not consistently with its duty accept as final the conclusion on that subject.

(3) That some other grave reason existed which should convince this Court that to allow the natural con-

> sequences of the judgment to have their effect, would conflict with the duty which rests upon this Court not to disbar except upon the conviction that, under the principles of right and justice, it were constrained to do so.

What better language of any Court could be found to be analogously applied to the situation prevalent in this Petitioner's case, in which all of these three conditions are patent?

In Reply to Argument III of Respondent.

Many constitutional questions are involved in this case.

The Respondent has completely missed the following important point (Respondent's Brief, pp. 7, 8 and 11).

The question is not what right, privilege or immunity is extended to practicing attorneys of other States to become practitioners in the State of New Jersey that is not likewise extended to attorneys and counsellors of the State of New York? Even in this regard, Petitioner has not been accorded the right, privilege and immunity accorded to Mr. Natelson (*In re Natelson* (Petitioner's Brief, pp. 9, 14, 20, 36)). This Petitioner has been subjected to different regulations. Under the New Jersey Supreme Court Rules Petitioner had to be a resident of New Jersey for at least six months prior to April, 1939. He is still such a resident, registered to vote in New Jersey at the coming National Election.

The real question is therefore what right, privilege or immunity is extended to New Jersey resident candidates for admission to the Bar that is not likewise extended to an attorney and counsellor at law of the State of New York, who is a resident of the State of New Jersey?

The answer is simple. Petitioner, among other things, is denied the equal protection of laws in New Jersey, unduly discriminated against and deprived of his property rights without due process of law by reason of the following:

(a) A different set of Rules applies to New Jersey candidates or why did the New Jersey Supreme Court abrogate Rule 11 on July 5, 1940? (Petitioner's Brief, p. 59.)

(b) Under the prior rules (Petitioner's Brief, p. 49), not abrogated until July 5, 1940 so far as Petitioner is concerned, and following the *Natelson* case, Petitioner should not be required to serve a clerkship —a most unreasonable requirement after over eleven years' practice.

(c) If the New Jersey Supreme Court meant Rule 9(a) to be applicable to attorneys who practiced in another State, it would have, especially after the *Natelson* and *Meigs* decisions, made Rule 9(a) more specific by adding the words "including an applicant who has practiced ten years in another State". Since such practitioners are not included in the rule, they are deemed to be excluded, particularly because Rule 6 (Petitioner's Brief, p. 57) mentions only "an attorney from another State" but is silent as to a "counsellor from another State".

The *Butcher* and *Hawker* cases (Respondent's Brief, p. 9) concern physicians, bills of attainder, *ex post facto* laws, and instances where the Legislature determined certain professional qualifications. These are not applicable to Petitioner's case.

In re Meigs (1931), 9 N. J. Misc. 234 (unreported in Atlantic), the Supreme Court cited with approval the

Natelson case (Petitioner's Brief, p. 37). Respondent is in error when it states (Respondent's Brief, p. 10) that before the *Natelson* decision there was no provision requiring an attorney from a foreign state to serve a clerkship after failure in examination. Rule 6(a), (b) and particularly (c) (Petitioner's Brief, pp. 52, 53) were in existence, for the Supreme Court held in the *Natelson* case that Rule 6(c) did not apply to attorneys from other States who had practiced ten years or more. Quite the contrary view was held in *In re Meigs* (1931), where Rule 6(c) was held applicable to a foreign attorney who had been only recently admitted in another jurisdiction. Accordingly, Petitioner submits he is not precluded from having the matter adjudicated in this Court since the decisions of the New Jersey Supreme Court are conflicting (Petitioner's Brief, p. 20).

It is important to state here that the *Bradwell* and *Lockwood* cases cited (Respondent's Brief, pp. 10-11) have an identical remarkable weakness. Nor does the *Lockwood* case (1893) dispose of this Petitioner's claim. Both these cases treat of the right of women attorneys to practice law in State Courts, which privilege they were denied by State Statutes. These cases were decided years before the enactment of the XIX Amendment (Woman Suffrage (1920)) to the United States Constitution and in effect have been automatically overruled. As to the *Hurwitz* case, it is sufficient to say that the New Jersey rules are not uniform. If they were, why were those which were conflicting abrogated July 5, 1940 by the Court itself?

In the final analysis, under the Rules (Petitioner's Brief, p. 49) existing prior to 1931 and existing thereafter by virtue of Rule 11 to the date of their abrogation on July 5, 1940, Petitioner merely had to give upon examination "satisfactory evidence of his learning in the

law and his knowledge of the practice thereof in New Jersey". This, Petitioner has done.

While the following may seem a remarkable departure from the citation of legal authorities, Petitioner believes that the language found in "Methods of Instruction—The Psychological, Pedagogical and Mechanical Factors" by Brig. Gen. C. H. Hodges, U. S. A., Infantry School, Fort Benning, Georgia, June 29, 1940, at page 27, is quite fitting here.

"Errors in Marking Examination Papers

> Scientific investigation has proved that the marking of examination papers is subjective; that is, different teachers, when working independently, tend to assign widely varying marks to the same paper. An investigation by Starch and Elliot is typical of many that have been made. These investigators selected a final examination in geometry, written by a student in one of the largest high schools in Wisconsin. An exact reproduction of this paper and a set of questions were sent to one hundred and eighty high schools in the North Central Association. It was requested that this paper be graded according to the practice and standards of the school by the principal teacher of mathematics. One hundred and sixteen replies were received. The papers showed evidence of having been marked with unusual care and attention.
>
> Of the one hundred and sixteen marks, two were above 90, while two were below 30. Twenty were 80 or above, while twenty other marks were below 60. Forty seven teachers assigned a mark passing or above, while sixty nine teachers thought the paper not worthy of a passing mark."

Could Respondent Board be so accurate as not to be mistaken in a point or so in grading the examination papers in question?

No set of facts as that in this Petitioner's case has ever been before this Court.

CONCLUSION.

The application for the writ of certiorari should be granted.

Respectfully submitted,

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